

PREPARED BY THE COURT:

STATE OF NEW JERSEY, : SUPERIOR COURT OF NEW JERSEY
DEPARTMENT OF : CHANCERY DIVISION
ENVIRONMENTAL : SUSSEX COUNTY
PROTECTION, :

Plaintiff,

 \mathbf{Y}_A

**JOSEPH WALLACE and
LAURA WALLACE,**

Defendants.

**SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
SUSSEX COUNTY**

DOCKET NO. SSX-C-7-19

CIVIL ACTION

ORDER

FILED

JUN 03 2019

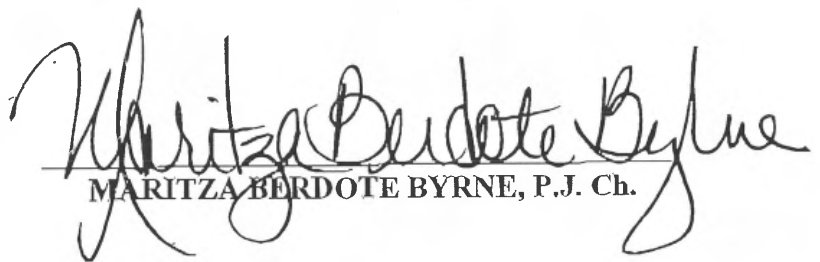
Marilza Berdote Byrne, P.J.Ch.

THIS MATTER comes before the court by way of Order to Show Cause filed by Kevin J. Fleming, Esq. and Matthew D. Knoblauch, Esq., counsel for plaintiff State of New Jersey, Department of Environmental Protection ("NJDEP"), and no opposition having been filed by Jeffrey M. Patti, Esq., counsel for defendants Joseph and Laura Wallace ("defendants"), and the court having read and considered the pleadings filed, and for the reasons set forth in the attached statement of reasons, and for good cause shown;

IT IS ON THIS 31st DAY OF JUNE 2019 ORDERED as follows:

1. Plaintiff's request for a preliminary injunction with restraints as stated in its Order to Show Cause filed on February 22, 2019 is **GRANTED**.
2. Defendants shall cease receiving any and all fill material and/or solid waste onto the property at Block 130, Lot 1.05, also known as 3 Silver Spruce Drive, Vernon, New Jersey (the "property").
3. Defendants shall provide access to NJDEP and/or individuals on behalf of NJDEP to delineate the area of disturbance and extent of the fill material brought onto the property, to perform any sampling of the material on the property, and/or perform any other inspections of the property as NJDEP deems necessary to determine compliance with the Solid Waste Management Act, the Water Pollution Control Act, and the Highlands Water Protection and Planning Act.

4. Within ten (10) days, defendants shall provide NJDEP with full and complete documentation setting forth the source and nature of the material brought onto the site since 2009, including but not limited to all analytical results, receipts, bills of lading, and identification of all transporting haulers.
5. Within sixty (60) days, defendants shall characterize all fill material to determine if it meets the definition of solid waste as defined in N.J.A.C. 7:26-1.6 and provide NJDEP an estimate for the cost of removal of the solid waste.
6. Within one-hundred and twenty (120) days, defendants shall remove and properly dispose of all fill material which meets the definition of solid waste on the property.
7. Within sixty (60) days, defendants shall place sufficient funds into escrow or an attorney trust account to guarantee adequate funds for removal of the solid waste on the property.
8. Within sixty (60) days, defendants shall submit and implement a soil erosion and sediment control plan for the property and apply for a 5G3 stormwater permit.


MARITZA BERDOTE BYRNE, P.J. Ch.

Statement of Reasons

SSX-C-7-19

State of New Jersey, Department of Environmental Protection v. Wallace et al.

This action involves a dispute between plaintiff, the State of New Jersey, Department of Environmental Protection ("NJDEP"), and defendants, Joseph Wallace and Laura Wallace ("defendants"), owners of real property located at Block 130, Lot 1.05, commonly known as 3 Silver Spruce Drive, Vernon Township, Sussex County, New Jersey (the "property"). Plaintiff filed a Complaint and Order to Show Cause on February 22, 2019 alleging defendants continue to operate an unpermitted solid waste management facility on their property in violation of the Solid Waste Management Act ("SWMA") and requesting the court compel defendants to: (i) immediately cease receiving fill and solid waste material on the property; (ii) immediately provide NJDEP access to the property to perform necessary inspections and sampling of the property; (iii) within ten days, provide NJDEP with documentation of potential solid waste on the property; (iv) within thirty days, characterize all fill material on the property to determine if it meets the definition of solid waste and provide NJDEP an estimate for the cost of removal; (v) within forty-five days, place sufficient funds in an escrow or trust account to guarantee removal of the solid waste from the property; and (vi) within ninety days, remove and properly dispose of all solid waste. Complaint, Count One.

On March 1, 2019, the court denied plaintiff's request for entry of an Order to Show Cause based on plaintiff's failure to prove, by clear and convincing evidence, it would succeed on the merits of its claims. However, the parties entered into a consent Order consenting to entry of paragraphs a, b, and e of the Order to Show Cause, compelling defendants Joseph Wallace and Laura Wallace to act as follows:

- (a) Immediately cease receiving any and all fill material and/or solid waste onto the property at Block 130, Lot 1.05, also known as 3 Silver Spruce Drive, Vernon, New Jersey (the “site”);
- (b) Immediately provide access to NJDEP and/or individuals on behalf of the Department to delineate the area of disturbance and extent of the fill material brought onto the site, to perform any sampling of the material on site, and/or perform any other inspections of the property as the Department deems necessary to determine compliance with the SWMA, the Water Pollution Control Act, and the Highlands Water Protection and Planning Act;
- (e) Within thirty (30) days of this order, provide NJDEP with full and complete documentation setting forth the source and nature of the material brought onto the site since 2009, including but not limited to all analytical results, receipts, bills of lading, and identification of all transporting haulers.

On April 8, 2019, NJDEP renewed its application for entry of all provisions included in its initial February 22, 2019 Order to Show Cause, based on soil testing it performed on the property on March 14, 2019 in accordance with the March 1, 2019 consent Order. This soil testing revealed soil contaminants in excess of the NJDEP’s residential soil standards.

Relevant Facts

Defendants’ involvement with NJDEP dates back to 2014 and includes complaints about ongoing violations on defendants’ property from private citizens, Vernon Township officials, and other entities. Complaint ¶¶ 9, 11. A tip to NJDEP’s hotline on July 23, 2014 resulted in a site inspection of the property on August 6, 2014. Id. Rajendra Gandhi (“Mr. Gandhi”), an environmental engineer with the Bureau of Solid Waste Compliance and Enforcement, was part of the NJDEP team that conducted this inspection. Certification of Rajendra Gandhi (“Gandhi Cert.”) ¶¶ 1, 4. During this inspection, Mr. Gandhi certifies the team observed an “area of fill material, on which there was a large sideslope of fill material that contained large amount of soil mixed with concrete, stone, brick, wood, plastic, and asphalt pieces.” Id. ¶ 4. Mr. Gandhi certifies the “fill material was placed on the downslope area of the Wallace property so that it filled a valley

at the boundary of his property.” Id. Mr. Gandhi indicates the inspection team “determined there was not enough evidence to conclude that the fill material was solid waste or to necessitate sampling of the material.” Id. ¶ 5. Following the inspection, NJDEP issued a warning letter to defendants on January 14, 2015 to facilitate future compliance. Id. ¶ 6. Mr. Gandhi certifies he has personally visited the property approximately ten times between August 2014 and December 2018 and certifies defendants have consistently failed to provide the requested documentation related to the cleanliness of the fill material. Id. ¶ 7.

On or about May 18, 2018, NJDEP received a complaint from Vernon Township’s business administrator, Charles Voelker, related to defendants’ property. Certification of Thomas Farrell (“Farrell Cert.”) ¶ 5. In May 2018, defendants’ neighbor also made a complaint about defendants’ property that contained photographs showing the extent of the fill material located on the property from an aerial vantage point. Id. ¶ 6, ex. A. An additional citizen complaint made to the New York Department of Environmental Conservation produced screenshots of Craigslist advertisements inviting truck drivers to move material from a “dump facility” to defendants’ property at “3 silver spruce drive sussex nj.” Id. ¶ 7, ex. B. Additionally, defendants pled guilty to six counts of unlawful disposal of solid waste in September 2017 as a result of purportedly dumping approximately 1,000 truckloads of construction and demolition debris in Warwick, New York. Id. ¶ 8, ex. C.

Legal action was previously initiated against defendants by the Township of Vernon in relation to alleged violations of the Soil Erosion and Sediment Control Act (N.J.S.A. 4:24-39 to -55). This action, filed under docket number SSX-C-20-18, was based on defendants allegedly disturbing an area in excess of 5,000 square feet without a soil erosion and sediment control plan. Complaint ¶ 16. The Sussex County Soil Conservation District issued a Stop Work Order on August 14, 2014, prohibiting defendants from “importing any additional fill material” onto their

property “until such time as a Soil Erosion and Sediment Control Plan has been submitted to and certified by the [Sussex County Soil Conservation District].” Certification of Richard T. Paull (“Paull Cert.”) ¶ 14. Vernon Township sought injunctive relief in Superior Court as the municipality empowered to enforce the Soil Erosion and Sediment Control Act pursuant to N.J.S.A. 4:24-53. Id. ¶ 16.

The Superior Court denied Vernon Township’s request for a temporary restraining Order and a preliminary injunction, reasoning the Stop Work Order applied only to a particular 5,000 square foot area rather the entire parcel of land. Id. ¶ 17. As a consequence of the court’s decision, a second Stop Work Order was issued against defendants “with more explicit language indicating what actions Wallace was prohibited from taking.” Id. ¶ 18. Per the court’s May 8, 2019 Order, the matter filed under docket number SSX-C-20-18 was dismissed without prejudice and the Township of Vernon was granted leave to file the claims previously raised and any additional claims permitted by law or equity in this action.

NJDEP’s application in the instant action stems from a report made to NJDEP on January 31, 2019 by one of defendants’ neighbors. This neighbor advised NJDEP some of defendants’ fill material had spilled across the property line onto his property located at 1 Silver Spruce Drive. Certification of David Ongaro (“Ongaro Cert.”) ¶ 5. The owner gave NJDEP permission to enter his property and sample the relevant materials. Id. David Ongaro (“Mr. Ongaro”), a NJDEP environmental specialist, was dispatched to the site and took a sample from fill material located “at the base of an approximately 50-foot high pole of fill material, with the material at the top being the most recent.” Id. ¶ 7. Mr. Ongaro states “[the material] was the same color, composition, and consistency of the mountain of fill material” observed on defendants’ property and states he is “certain that [the mountain] is where it came from.” Id. Mr. Ongaro states he collected two

samples from the fill material from a total of “twelve to fifteen frozen chunks [that] had rolled approximately five feet from the property line of the Wallace property at three locations.” *Id.* Mr. Ongaro states he sent these samples for testing and received results indicating one of the samples contained “concentrations of at least two contaminants that exceed the residential direct contact soil remediation standards as set forth in N.J.A.C. 7:26D.” *Id.* ¶ 10, ex. A. Pursuant to these results, on February 20, 2019, NJDEP issued two notices of violation to defendants for violating N.J.A.C. 7:26-2.8(f), one notice for operating an unlicensed solid waste facility and one notice for failure to permit entry to NJDEP inspectors. Complaint ¶ 7.

Preliminary Injunction

NJDEP argues it is entitled to injunctive relief pursuant to defendants’ statutory violations and general equitable principles. Brief in Support of Plaintiff’s Verified Complaint and Order to Show Cause (“Supp. Brief”) at 10-17. NJDEP claims case law indicates irreparable harm does not need to be shown with respect to injunctive relief when such an injunction is authorized by statute. Matawan Reg’l Teachers Assoc’n v. Matawan-Aberdeen Reg’l Bd. of Educ., 212 N.J. Super. 328, 334-35 (Law. Div. 1986) (citing Hoffman v. Garden State Farms, 76 N.J. Super. 189, 201 (Ch. Div. 1962)). Supp. Brief at 10-11. NJDEP states their sampling of fill material from defendants’ property demonstrates they are operating an unpermitted solid waste facility in violation of N.J.A.C. 7:26-2.8(f) and have similarly violated N.J.A.C. 13:1D-9(d) by preventing NJDEP from entering the property to investigate potential sources of pollution. *Id.* at 11. NJDEP argues because it is empowered to seek injunctive relief by statute, it need not make any further showing beyond defendants’ statutory violations. *Id.* at 11.

NJDEP argues it is alternatively entitled to injunctive relief pursuant to the factors outlined in Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982). Supp. Brief at 12-13. NJDEP states its request

for injunctive relief is based on “unambiguous statutory authority that is well-settled” in New Jersey. Id. at 13. NJDEP asserts its “first goal” is to have defendants “cease [their] unpermitted and destructive activities” and its “rights are well-settled and [] entitled to success on the merits.” Id. at 14. NJDEP claims the balancing of equities and hardships also favor the granting of injunctive relief. Id. NJDEP states “the people of New Jersey are negatively impacted by [defendants’] activities . . . [in] import[ing] and dump[ing] thousands of cubic yards of fill material that has been determined to contain contaminants that would qualify certain of the material as solid waste.” Id. at 14. NJDEP states defendants’ action are exacerbated by the property’s location in the Highlands Preservation Area. Id. at 14-15. NJDEP asserts defendants’ explanations for his actions, including the need to expand his property for business and reinforce it from hurricane damage, do not justify the dumping of contaminated material on his property, particularly in “the most environmentally sensitive area of the Highlands.” Id. at 15. NJDEP states defendants’ action have further caused irreparable harm, reasoning “[m]oney cannot recreate a contaminated ecosystem exactly as it was nor can money reverse half a decade of unlicensed dumping of contaminated fill material.” Id. at 16. Finally, NJDEP states its request for injunctive relief seeks to enforce statutory and regulatory provisions and thereby supports, rather than harms, the public interest. Id. at 16-17.

Despite defendant requesting an extension of time to file opposition, no opposition was filed. Defendant has twice written to the court, once requesting a stay until all municipal complaints have been resolved, and once requesting entry of only the prior consented to provisions of the March 1, 2019 consent Order. These letters were faxed, not filed in accordance with the Rules of Court. These letters were also late sent despite the extension of time to file opposition afforded to defendants. Therefore, the court considers plaintiff’s application unopposed.

The New Jersey Supreme Court has held a party seeking injunctive relief must demonstrate (1) the injunction is necessary to prevent irreparable harm; (2) the legal right underlying the party's claim is settled; (3) it is reasonably likely that the party will succeed on the merits of its claim; and (4) an analysis of the relative hardship to the parties favors the party seeking the injunction. See Crowe v. DiGioia, 90 N.J. 126, 132-134 (1982). It is generally understood that all the Crowe factors must weigh in favor of injunctive relief. Waste Management of New Jersey, Inc. v. Union County Utilities Authority, 399 N.J. Super. 508, 520 (App. Div. 2008). "[T]he remedy of injunction is an extraordinary one and may not be awarded to any suitor unless and until his right to it is established by clear and convincing testimony, free of all reasonable doubt." Harrison v. Floyd, 26 N.J. Super. 333, 347 (Ch. Div. 1953).

Irreparable harm is generally considered to be harm that "cannot be addressed adequately by monetary damages." Crowe, 90 N.J. at 133. Here, plaintiff has presented clear and convincing evidence the mountain-like amount of fill material piled on defendants' property is encroaching onto neighboring properties. This is supported by the descriptions of the property by inspectors who collected samples from it in 2014 and 2018, as well as by the overhead images of the property provided by neighbors. Harm of this nature cannot be addressed with monetary damages and thereby supports a finding of irreparable harm.

The second and third prongs of the Crowe analysis are related. A party seeking injunctive relief must show it has a reasonable likelihood of eventual success on the merits in accordance with well-settled principles of law. Crowe, 90 N.J. at 133. Here, NJDEP alleges defendants have violated the following New Jersey statutes: N.J.A.C. 7:26-2.8(f) (operating a solid waste facility without a permit); N.J.S.A. 13:1E-9 (NJDEP has the authority to enter and inspect a site for the purpose of investigating any action or suspected source of pollution to the environment); and

N.J.A.C. 7:14A-24.2 (applying for and obtaining a stormwater permit pursuant to the Highlands Water Protection and Planning Act). These statutes demonstrate the legal right underlying NJDEP's claims against defendants are settled. However, with regard to a reasonable probability of plaintiff's ultimate success on the merits, NJDEP bears a particularly heavy burden as it must prove this factor using clear and convincing evidence.

At the March 1, 2019 Order to Show Cause hearing, the court found plaintiff had not met this burden, as plaintiff had identified only that the fill material collected and analyzed in February 2019 likely came from defendants' property. Because the previous sample was taken from a neighboring property and not directly from defendants' property, plaintiff did not meet the clear and convincing standard at that time. On April 8, 2019, NJDEP submitted a report ("April 8 Report") detailing the sampling and mapping analysis conducted on the defendant's property following the March 1, 2019 consent Order. Update Letter from Plaintiff dated April 8, 2019 ("April 8 Letter") at 1. The April 8 Report details eight samples taken from eight locations on defendants' property, each of which, when tested, showed contaminants exceeding the NJDEP's residential soil standards. Id. at 2, ex. A. Based on these exceedances, the materials are considered solid waste such that defendants are "operating an unlicensed solid waste facility" Id. at 2. Because these samples were taken directly from defendants' property, there is now a sufficient nexus to clearly and convincingly show defendants' property contains solid waste in violation of the applicable New Jersey statute. Accordingly, plaintiff demonstrates by clear and convincing evidence defendants have violated N.J.A.C. 7:26-2.8(f) by operating a solid waste facility without a permit.

With respect to plaintiff's additional allegations related to N.J.S.A. 13:1E-9, defendants do not dispute on or about January 19, 2019, they advised NJDEP inspectors they would not permit

any access to their property without a search warrant, thereby violating NJDEP's authority to enter and inspect a site for the purpose of investigating any action or suspected source of pollution. See Complaint ¶13. With respect to plaintiff's additional allegations related to N.J.A.C. 7:14A-24.2, defendants do not dispute their property is located in the Preservation Area of the Highlands and they have not obtained a permit for their land disturbance exceeding one acre to ensure the stormwater runoff is properly managed, thereby violating the Highlands Water Protection and Planning Act's requirement to apply for and obtain a stormwater permit in such situation. See Complaint ¶¶ 14, 15. Moreover, the April 8, 2019 Report confirmed the pile of material constituting solid waste on defendants' property measures approximately 2.44 acres in area, placing them in violation of the one acre limit. See April 8 Letter at 3.

"The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying relief." Crowe, 90 N.J. at 134. Here, the facts weigh strongly in favor of granting injunctive relief. Defendants' property is located in the preservation area of the Highlands such that there is a public interest in ensuring the runoff and stormwater do not negatively impact this environmentally-protected area. Moreover, the contamination from defendants' property has already been shown to negatively affect at least one of the neighboring properties.

Conclusion

Plaintiff has submitted clear and convincing evidence of irreparable harm, established a reasonable probability of success on the merits of its legal claims, and established the equities in this matter balance in its favor. Plaintiff's request for a preliminary injunction with restraints as included in its Order to Show Cause filed on February 22, 2019 is **GRANTED**.